U. S. DEPARTMENT OF LABOR

Employees' Compensation Appeals Board

In the Matter of ANGEL M. GARCIA and DEPARTMENT OF THE ARMY, MAINTENANCE DIVISION, Fort Bliss, Tex.

Docket No. 96-1982; Submitted on the Record;
Issued July 1, 1998

DECISION and ORDER

Before GEORGE E. RIVERS, WILLIE T.C. THOMAS, BRADLEY T. KNOTT

The issue is whether the Office of Workers' Compensation Programs properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) of the Federal Employees' Compensation Act, on the basis that his request for reconsideration was not timely filed within the one-year time limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

This case has previously been before the Board. In a September 6, 1994 decesion,[1] the Board found that appellant had not met his burden of proof to establish that his condition and disability after December 5, 1988 were causally related to his October 26, 1988 employment related left elbow laceration and superficial abrasion of the abdomen. The Board further found that the Office's refusal to reopen appellant's case for a review on the merits pursuant to 5 U.S.C. § 8128(a) did not constitute an abuse of discretion. The facts of the case contained in the prior Board decision are incorporated herein by reference.

By letter dated November 28, 1995, and received December 1, 1995, appellant, through counsel, requested that his claim for compensation be reconsidered.

In a decision dated December 11, 1995, the Office denied appellant's request for reconsideration on the basis that it was not filed with the one-year time limit set forth by 20 C.F.R. § 10.138(b)(2) and that it did not present clear evidence of error.

The Board finds that the Office, by its December 11, 1995 decision, properly refused to reopen appellant's case for further review of the merits of his claim under 5 U.S.C. § 8128(a) of the Act, on the basis that his request for reconsideration was not timely filed within the one-year time-limitation period set forth in 20 C.F.R. § 10.138(b)(2) and did not present clear evidence of error.

[1] Docket No. 93-1171.

Section 8128(a) of the Federal Employees' Compensation Act vests the Office with discretionary authority to determine whether it will review an award for or against compensation:

> "The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application. The Secretary, in accordance with the facts found on review may --
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> (1) end, decrease, or increase the compensation awarded; or
>
> (2) award compensation previously refused or discontinued.'"

The Office, through regulations, has imposed limitations on the exercise of its discretionary authority under 5 U.S.C. § 8128(a). As one such limitation, 20 C.F.R. § 10.138(b)(2) provides that "the Office will not review ... a decision denying or terminating a benefit unless the application is filed within one year of the date of that decision." The Board has found that the imposition of this one-year limitation does not constitute an abuse of the discretionary authority granted the Office under 5 U.S.C. § 8128(a).[2]

In the present case, as more than one year elapsed from the most recent merit decision, the September 6, 1994 decision of the Board, to appellant's November 28, 1995 reconsideration request, the Office properly determined that appellant's application for review was not timely filed within the one-year time limitation set forth in 20 C.F.R. § 10.138(b)(2).

The Office, however, may not deny an application for review based solely on the grounds that the application was not timely filed. For a proper exercise of the discretionary authority granted under 5 U.S.C. § 8128(a), when an application for review is not timely filed, the Office must nevertheless undertake a limited review to determine whether the application shows "clear evidence of error" on the part of the Office.[3] Office procedures state that the Office will reopen a claimant's case for merit review, notwithstanding the one-year filing limitation set forth in 20 C.F.R. § 10.138(b)(2), if the claimant's application for review shows "clear evidence of error" on the part of the Office.[4]

To establish clear evidence of error, a claimant must submit evidence relevant to the issue which was decided by the Office.[5] The evidence must be positive, precise and explicit and must be manifest on its face that the Office committed an error.[6] Evidence which does not raise a substantial question concerning the correctness of the Office's decision is insufficient to establish clear evidence of error.[7] It is not enough merely to show that the evidence could be

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[2] *Leon D. Faidley, Jr.*, 41 ECAB 104 (1989).

[3] Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.3(b) (May 1991).

[4] *Id.*

[5] *See Dean D. Beets*, 43 ECAB 1153 (1992).

[6] *See Leona N. Travis*, 43 ECAB 227 (1991).

[7] *See Jesus D. Sanchez*, 41 ECAB 964 (1990).

construed so as to produce a contrary conclusion.[8] This entails a limited review by the Office of how the evidence submitted with the reconsideration request bears on the evidence previously of record and whether the new evidence demonstrates clear error on the part of the Office.[9] To show clear evidence of error, the evidence submitted must not only be of sufficient probative value to create a conflict in medical opinion or establish a clear procedural error, but must be of sufficient probative value to *prima facie* shift the weight of the evidence in favor of the claimant and raise a substantial question as to the correctness of the Office decision.[10] The Board makes an independent determination of whether a claimant has submitted clear evidence of error on the part of the Office such that the Office abused its discretion in denying merit review in the face of such evidence.[11]

In the present case, appellant has not presented evidence that the Office's most recent merit decision was in error. Appellant raised no arguments on reconsideration and presented no evidence indicating his condition and disability after December 5, 1988 were causally related to his October 26, 1988 employment injury.

As appellant has failed to submit clear evidence of error, the Office did not abuse its discretion in denying further review of the case.

The December 11, 1995 decision of the Office of Workers' Compensation Programs is affirmed.

Dated, Washington, D.C.
July 1, 1998

George E. Rivers
Member

Willie T.C. Thomas
Alternate Member

Bradley T. Knott
Alternate Member

[8] *See Leona N. Travis, supra* note 6.

[9] *Nelson T. Thompson*, 43 ECAB 919 (1992).

[10] *Leon D. Faidley, Jr., supra* note 2.

[11] *Gregory Griffin*, 41 ECAB 186 (1989).